Clara Tai Saw Lan v Kurnia Insurans (M) Bhd

COURT OF APPEAL — CIVIL APPEAL NO W–02–928 OF 1999
GOPAL SRI RAM, HAIDAR AND ABDUL HAMID MOHAMAD JJCA
15 JANUARY 2001

Labour Law *— Industrial Court — Award — Whether there was non-compliance by the respondent of the first award — Whether application for enforcement should be made under s 56 of the Industrial Relation Act 1967 — Industrial Relations Act 1967 s 56*

Labour Law *— Industrial Court — Termination of employment — Absenteeism — Whether matter relied by respondent amounted to fresh act of misconduct*

The appellant was employed by the respondent as Senior Manager (Claims) since 2 May 1992. By a letter dated 9 June 1995, the appellant was dismissed by the respondent. The appellant then made representation to the Director General of Industrial Relations (DGIR) ('the first representation'), who referred the dispute to the Industrial Court. On 22 November 1997, the Industrial Court handed down an award in favour of the appellant, wherein, inter alia, the appellant was to be reinstated to her former position within one month of the award and payments to be made under the award were to be paid to the appellant within one week after the appellant reported for duty ('the first award'). When the appellant reported for duty on 22 December 1997, she was handed a letter dated 20 December 1997 wherein she was informed that the respondent was not reinstating her. On 3 January 1998, the respondent applied for an order of certiorari to quash the first award, which was dismissed. On 17 December 1998, the appellant made a complaint to the Industrial Court under s 56(1) of the Industrial Relations Act 1967 ('the Act') for non-compliance by the respondent of the first award ('the second complaint'). On 5 February 1999, the respondent wrote to the appellant informing her that she would be reinstated with effect from 9 February 1999 but not to her former position. By a letter dated 8 February 1999, the appellant informed the respondent that she would be unable to comply with the respondent's request to report for duty to some new post. Subsequently on 24 February 1999, the respondent terminated the appellant services. On 11 March 1999, the appellant made representation to the DGIR ('the second representation') which is still pending. The Industrial Court heard the second complaint and handed down an award in the appellant's favour wherein the respondent was ordered to comply within 14 days from the date of service of the award on the respondent ('the second award'). The respondent applied for an order of certiorari to quash the second award, which was allowed by the High Court. Hence, this appeal to the Court of Appeal. The issue for determination was whether the respondent had not complied with the terms of the first award and whether there was fresh misconduct on the appellant's part.

Held, allowing the appeal with costs:

(1) (per **Abdul Hamid Mohamad JCA**) The respondent did not call the appellant to go back to work within the one-month period and also not allowing her to resume her job when she reported for duty on 22 December 1997 as well as not paying her the backwages as ordered by the Industrial Court. In the circumstances, there is a clear case of non-compliance of the first award by the respondent. Thus, the failure of the appellant to file an affidavit of opposition against the respondent's substantive motion os of no consequence (see pp 507E–F, 510C).

(2) (per **Abdul Hamid Mohamad JCA**) This was a case falling within the ambit of the provisions of s 56 of the Act and that it was within the jurisdiction and powers of the Industrial Court to make the second award that it did. The Industrial Court had not committed any error of law that warranted the High Court to review and quash the second award by an order of certiorari (see p 510D–E).

(3) (per **Gopal Sri Ram JCA**) The matters relied upon by the respondent as amounting to an act of misconduct on the part of the appellant was not a fresh act at all. It was so closely and directly connected with the award of reinstatement that it formed part and parcel of the initial dispute between the parties. There was an award against the respondent directing it to reinstate the appellant. It had studiously refrained from obeying that award. The appellant accordingly invoked the non-compliance procedure provided by s 56 of the Act (see p 502B–C).

[**Bahasa Malaysia summary**

Perayu telah diambil bekerja oleh responden sebagai Pengurus Kanan (Tuntutan) semenjak 2 Mei 1992. Melalui sepucuk surat bertarikh 9 Jun 1995, perayu telah dipecat oleh responden. Perayu kemudian telah membuat representasi kepada Pengarah Perhubungan Perusahaan (PPP) ('representasi pertama'), yang merujuk pertikaian tersebut kepada Mahkamah Perusahaan. Pada 22 November 1997, Mahkamah Perusahaan telah memberikan satu award menyebelahi perayu, di mana, antara lain, perayu dikembalikan jawatan kepada jawatan asal beliau dalam masa satu bulan daripada award tersebut dan bayaran yang perlu dibuat di bawah award tersebut dibayar kepada perayu dalam masa satu minggu selepas perayu melaporkan diri untuk bertugas ('award pertama'). Apabila perayu melaporkan diri untuk bertugas pada 22 Disember 1997, beliau telah memberikan sepucuk surat bertarikh 20 Disember 1997 di mana beliau memaklumkan bahawa responden tidak mengembalikan jawatan beliau. Pada 3 Januari 1998, responden memohon satu perintah certiorari untuk membatalkan award pertama, yang telah ditolak. Pada 17 Disember 1998, perayu telah membuat aduan kepada

Mahkamah Perusahaan di bawah s 56(1) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') kerana ketidakpatuhan oleh responden terhadap award pertama ('aduan kedua'). Pada 5 Februari 1999, responden telah menulis kepada perayu memaklumkan beliau bahawa beliau akan dikembalikan jawatan berkuat kuasa daripada 9 Februari 1999 tetapi bukan kepada jawatan asal beliau. Melalui sepucuk surat bertarikh 8 Februari 1999, perayu telah memaklumkan kepada responden bahawa beliau tidak dapat memenuhi permintaan responden untuk melaporkan diri untuk bertugas kepada jawatan lain. Berikutan itu pada 24 Februari 1999, responden telah menamatkan perkhidmatan perayu. Pada 11 Mac 1999, perayu telah membuat representasi kepada PPP ('representasi kedua') yang masih tertangguh. Mahkamah Perusahaan mendengar aduan kedua dan memberikan award menyebelahi perayu di mana responden diperintahkan mematuhi dalam 14 hari daripada tarikh penyampaian award ke atsa responden ('award kedua'). Responden memohon satu perintah certiorari untuk membatalkan award kedua, yang dibenarkan oleh Mahkamah Tinggi. Justeru itu, rayuan ini dibuat kepada Mahkamah Rayuan. Isu yang perlu ditentukan adalah sama ada responden tidak mematuhi terma-terma award pertama dan sama ada terdapat salah laku baru di pihak perayu.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) (oleh **Abdul Hamid Mohamad HMR**) Responden tidak memanggil perayu untuk kembali bertugas dalam tempoh satu bulan tersebut dan juga tidak membenarkan beliau kembali bertugas apabila beliau melaporkan diri bertugas pada 22 Disember 1997 dan begitu juga tidak membayar kepada beliau gaji sebelumnya sebagaimana diperintahkan oleh Mahkamah Perusahaan. Dalam keadaan demikian, terdapt jelas satu kes ketidakpatuhan terhadap award pertama oleh responden. Oleh itu, kegagalan perayu untuk memfailkan satu afidavit bantahan terhadap usul substantif responden tidak penting (lihat ms 507E–F, 510C).

(2) (oleh **Abdul Hamid Mohamad HMR**) Ini adalah kes yang jatuh di bawah lingkungan peruntukan s 56 Akta tersebut dan ia adalah di dalam bidang kuasa dan kuasa Mahkamah Perusahaan untuk membuat award kedua seperti yang telah dibuat. Mahkamah Perusahaan tidak melakukan apa-apa kekhilafan undang-undang yang mewarankan Mahkamah Tinggi mengkaji semula dan membatalkan award kedua tersebut melalui satu perintah certiorari (lihat ms 510D–E).

(3) (oleh **Gopal Sri Ram HMR**) Perkara-perkara yang responden bergantung kepada sebagai wujudnya satu perbuatan salah laku di pihak perayu bukan satu perbuatan baru sama sekali. Ia amat rapat dan secara langsung berkaitan dengan award pengembalian jawatan tersebut sehingga membentuk sebahagian dan keseluruhan pertikaian asal antara pihak-pihak tersebut. Wujud

award terhadap responden memerintahkan ia mengembalikan jawatan perayu. Ia telah dengan teliti menahan diri daripada mematuhi award tersebut. Perayu dengan wajarnya telah menggunakan prosedur ketidakpatuhan yang diperuntukkan oleh s 56 Akta tersebut (lihat ms 502B–C).]

Notes

For cases on Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1029-1128.

Cases referred to

Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Chartered Bank, Kuching v Kuching Bank Employees' Union [1966] 2 MLJ xliv (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor [1987] 2 MLJ 81 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1955] 1 MLJ 281 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Sangram Singh v Election Tribunal AIR 1955 SC 425 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Industrial Relations 1967 ss 20, 33A, 33B(2), 56
Rules of the High Court 1980 O 3 r 6, O 18 r 19

Appeal from:

P Kuppusamy (*P Thavaselvi* with him) (*P Kuppusamy & Co*) for the appellant.

John S N Fam (*S N Fam*) for the respondent.

Gopal Sri Ram JCA. : I have read the judgment of my learned brother Abdul Hamid Mohamad JCA in draft and agree with the views he has expressed therein. I have but a few words of my own that I wish to add. For convenience, all references in this judgment to 'the Act' are in respect of the Industrial Relations Act 1967.

The judge's decision to issue certiorari was, in my view of this case, based upon at least two false premises. I will deal with them briefly, but not necessarily in their order of importance.

First, it was assumed that the respondent was not in breach of the terms of the award of reinstatement made in the appellant's favour. That was not

the case. The truth was quite the opposite. The respondent had acted in plain defiance of the order reinstating the appellant to her previous post. Subject to s 33A of the Act, (which is not relevant here) an order of reinstatement cannot be stayed. See, s 33B(2) of the Act. Here, then is a case where the respondent came to court with a tainted conscience when applying for what is essentially a discretionary remedy. So, even if the Industrial Court had erred in law in making the non-compliance award (which I hasten to add is not the case here), it would well have been within the judge's province to decline any remedy. To the respondent, therefore, I would recite the words of Bose J, in *Sangram Singh v Election Tribunal* AIR 1955 SC 425 at p 429, applied on two occasions by our Federal Court (see *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145:

> That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

Second, the learned judge concluded that the appellant had acted in breach of a lawful instruction given to her by the respondent as employer, namely to report to work. According to him, this was a fresh act of misconduct which entitled the respondent to discharge the appellant from further employment. In so holding, the judge did not have sufficient regard for the relevant factual matrix against which the appellant's so called act of disobedience was allegedly committed.

It is not in doubt that the respondent — putting its case at the highest — disabled itself from placing the appellant in the same post that she occupied before her first dismissal. There was no attempt by the respondent to place the appellant in an equivalent post or even if that was not possible to place her in a different post and offer her fair compensation for any loss in seniority. On the other hand, the respondent took a hard line with the appellant that evinced an intention never to comply with the award reinstating the latter to her former post. Quite naturally, the appellant refused to accept the shabby treatment meted out to her by the respondent despite an award in her favour. She therefore declined the respondent's offer made outside the time limited for compliance and to a post different from that she had previously held. It is this refusal that the respondent treated as an act wilful disobedience and purported to dismiss her for

misconduct. And it is against this background that the learned judge held the appellant to have committed a fresh act of misconduct warranting dismissal. It followed, according to the learned judge, that the only lawful course of action open as consolation to the hapless appellant was to lodge a fresh complaint against the respondent under s 20 of the Act and to re-start the whole process once again. The appellant's case could not, in the view of the judge, properly form the subject matter of a complaint of non-compliance under s 56 of the Act.

With respect, I must register my strong dissent against the conclusions arrived at by the learned judge. The error into which he fell was a result of his missing a vital flaw in the respondent's primary argument. It is this. The matters relied upon by the respondent as amounting to an act of misconduct on the part of the appellant was not a fresh act at all. It was so closely and directly connected with the award of reinstatement that it formed part and parcel of the initial dispute between the parties. There was an award against the respondents directing them to reinstate the appellant. They had studiously refrained from obeying that award. The appellant accordingly invoked the non-compliance procedure provided by s 56 of the Act. The appellant's case is sufficiently covered by relevant authority in the form of *Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81. In that case, Abdoolcader SCJ, when rejecting the almost identical argument in the context of the non-compliance of the term of a collective agreement said at p 84:

> We are accordingly of the firm view that the provisions of ss 56(2)(b) and 52(2) clearly empowered the Industrial Court to make the award it did in dealing with the complaint of the appellant of non-compliance by the respondent with the provisions of art 42(a) of the collective agreement. Our conclusion is wholly in consonance with the principle that differences and disputes in industrial relations *ex necessitate rei* requires to be determined and disposed of as expeditiously as possible — a prescriptive postulate statutorily endorsed and affirmed in s 30(3). Section 56 was clearly enacted to effectuate this requirement and end, as otherwise recourse would have to be had to a reactivation *ab initio* and repetition of the whole tedious exercise of the conciliation and consequential process under s 26 by reference to the Industrial Court once again for resolving a trade dispute in a clear and uncontroverted case of mere non-compliance with a term of an award or collective agreement taken cognizance of by the Industrial Court.

Now, substitute 'award' for 'collective' agreement' and the appellant's case falls plumb within the passage above quoted. This, I think, is a complete answer to the respondent's argument.

But I would go further. Based on the facts of this case, it is my respectful view that if this had been a civil suit, the judge would have been entitled to act under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') and strike out the respondent's action as being plainly and obviously unsustainable. I say this because of the respondent's scant regard for the award of reinstatement by the Industrial Court. And because its conduct towards the appellant which comes well within the category of unfair labour practice formulated by Sir George Oehlers in *Chartered Bank, Kuching v Kuching Bank Employees' Union* [1966] 2 MLJ xliv.

The appellant's appeal was therefore allowed with those consequential orders that usually follow success before this court.

Abdul Hamid Mohamad JCA. : The appellant was employed by the respondent as senior manager (claims) since 2 May 1992. By a letter dated 9 June 1995, the appellant was dismissed by the respondent. That letter reads:

> Re: MANAGEMENT DECISION — DOMESTIC INQUIRY Reference to the above, we regret to inform you that the Domestic Inquiry Committee, after going through the necessary inquiries, has found you guilty of conduct prejudicial to the interests of the Company.
>
> For the reason aforesaid, we now terminate your service with us with immediate effect.

The appellant then made representation to the Director General of Industrial Relations (DGIR) that she had been dismissed without just cause or excuse 'the first representation'.

As the DGIR could not resolve the dispute, the Minister of Human Resources referred the dispute to the Industrial Court. The reference was made on 22 June 1996 and was registered as Industrial Court Case No 4/4–329/96 ('the first complaint').

On 22 November 1997, the Industrial Court handed down the award — Award No 561 of 1997 ('the first award'). The court made the following orders:

> 1 That the claimant be reinstated to her former position in the Company within one month from the date hereof without loss allowance, seniority and service benefits.
>
> 2 Backwages — In the circumstances of this case the Company is entitled to a remission for reason of delay by the claimant. The hearing should have proceeded on 31 December 1996 but for the claimant who had requested for an adjournment and was unable to proceed. It would be inequitable for the Company to compensate the claimant for the delay which was not the Company's fault. Therefore the claimant is awarded backwages from 9 June 1995 to 31 December 1996.
>
> 3 The backwages or other payments are to be paid, less income tax deduction and Employees Provident Fund contribution, if any, to the claimant within one week after the claimant has complied with cl (1) of this award by reporting for duty.

When the appellant reported for duty on 22 December 1997, she was handed a letter dated 20 December 1997. That letter was not exhibited but as stated by the President of the Industrial Court in the court's Award No 252 of 1999 handed down on 22 May 1999 ('the second award') and which was not in dispute, the gist of the letter was that the company was 'in the process of appealing to the High Court against the decision of the Industrial Court and that it was not reinstating the claimant.

On 3 January 1998, the respondent applied in the High Court for an order of certiorari to quash the first award. The application was dismissed by the High Court on 22 September 1998.

On 17 December 1998 the appellant made a complaint to the Industrial Court under s 56(1) of the Industrial Relations Act 1967 ('the Act') for non-compliance by the respondent of the first award ('the second complaint'). A

On 5 February 1999 the respondent wrote to the appellant. The letter reads: B

> INDUSTRIAL COURT AWARD NO 561 OF 1997 BETWEEN KURNIA INSURANS (M) BERHAD AND CLARA TAI SAW LAN
>
> We refer to the above matter and the various negotiations between your Solicitors and our Solicitors to resolve the above matter on a without prejudice basis.
>
> As the parties are unable to reach an amicable resolution of the above matter until recently, we therefore take the relevant steps to comply with the Industrial Court Award abovementioned. C
>
> Please be informed that in compliance with the said Award, Kurnia Insurans (M) Berhad (the Company) shall:
>
> (1) Reinstate you with effect from 9 February 1999, D
>
> (2) That upon you reporting for duty, the relevant back wages net, of EPF contributions and personal tax payable to the Inland Revenue, in accordance to the said Award from 9 June 1995 to 31 December 1996 shall be paid to you within one (1) week thereof.
>
> Be that as it may, we regret to inform you that your last position as senior manager claims is no longer vacant in the Company as the same has been filled by suitably qualified personnel sometime after your dismissal. E
>
> In the circumstances, you are to report on the 9 February 1999 and liaise with the undersigned.

The appellant responded by letter dated 8 February 1999 as follows: F

> INDUSTRIAL COURT AWARD NO 561 OF 1997
>
> Reference is made to the Company's letter dated 5 February 1999 in respect of the above matter.
>
> I note from the letter that the Company has not complied with the abovementioned Award in the following respects:
>
> (a) I have not been reinstated to my former post as ordered by the Industrial Court; and G
>
> (b) The Company's computation of arrears of salary is incorrect.
>
> As the Company has refused to reinstate me to my former post, I am unable to comply with the Company's request to report for duty to some new post.

On 24 February 1999 the respondent wrote to the appellant: H

> INDUSTRIAL COURT AWARD NO 561 OF 1997 BETWEEN KURNIA INSURANS (M) BERHAD AND CLARA TAI SAW LAN
>
> We refer to the above and your letter dated 8 February 1999 and noted the contents thereof.
>
> Please be informed that your failure or refusal to report for duty premised upon the content of your letter is unjustifiable, wrongful and without any basis and amounted to a deliberate action on your part to frustrate the due I

compliance of the Industrial Court Award by us after the recent breakdown of the negotiation toward an amicable resolution of the above matter between yourself and us on a without prejudice basis.

Further, your refusal and failure to report for duty amounted to a breach of the said Award and the letter of appointment dated 10 April 1992 without any justification.

In the above circumstances, we regret to inform you that your service is hereby terminated with immediate effect for failing and refusing to report for duty without justification after receiving your letter dated 8 February 1999.

Please be informed that you are to attend at our office and contact the undersigned within seven (7) days from the date of receipt of this letter for the settlement of the back wages in accordance to the said Award less EPF contribution and personal tax payable to the Inland Revenue.

On 11 March 1999, the appellant made representation to the DGIR ('the second representation') that she had been dismissed without just cause or excuse. The respondent was informed of the representation to the DGIR by letter from the appellant's solicitors dated 24 March 1999. The said representation is still pending in the Industrial Relations Department.

The Industrial Court heard the second complaint and handed down the second award on 22 May 1999.

The court, in its award found:

> The court could only conclude that the Company had never had the intention to have the complainant (appellant — added) back in the Company (respondent — added) less still of reinstating her to her former position.

The court held that the respondent had not complied with the first award and ordered the respondent to comply within 14 days from the date of service of the second award on the respondent.

The respondent again went to the High Court and applied for an order of certiorari. On 27 October 1999, the High Court allowed the respondent's application. The learned judge held that the effect of the order for reinstatement was to restore the relationship of master and servant, ie that the appellant was and continued to be an employee of the respondent. The reinstatement invested in the respondent with rights over the appellant including the power of disciplinary action, including dismissal for any fresh misconduct. An employee is bound to obey a lawful command of an employer 'and failure to do so is misconduct that justifies summary dismissal.' The learned judge also held that the respondent's letter dated 5 February 1999 was such a lawful command. The appellant must comply whether she agreed with it or not. Her failure to do so was a clear insubordination. That was a fresh event subsequent to the first award. She could contend that the termination was wrongful but she had to do so by way of a fresh proceeding under s 20(1) of the Act, not under s 56(1). The learned judge went on to say:

> 6 A new legal regime had replaced the state of affairs created by the first award and hence it was a new termination that attracted a new recourse for redress under the Act. Therefore, a new remedy for a new dismissal

> founded on misconduct after the first award, cannot be given by a different authority (ie the Industrial Court) under the guise of non-compliance of the first award given for a dismissal that arose for a different misconduct. By doing so, the Industrial Court had acted ultra vires the Act by usurping the powers of the Minister and without a reference from the Minister which reference was the source of the jurisdiction of the Industrial Court for a claim of wrongful dismissal for a workman under s 20. The legality or otherwise of the second termination was a matter for separate and independent proceedings following upon the complaint made by the first Respondent (appellant — added). The first award so far as it concerned the reinstatement had been superseded or spent by the second termination.

The learned judge also held that the appellant 'had elected and accepted' the respondent's letter dated 24 February 1999 as dismissal without just cause or excuse and made a complaint to the DGIR under s 20 of the Act. Having done so, she was estopped from complaining of non-compliance of the first award. The learned judge also held that the order for reinstatement had become academic by reason of the second termination. Lastly, the learned judge took up the point that the appellant had not filed an affidavit in opposition to the substantive motion. In the absence of such an affidavit the appellant was 'deemed to admit the averments of' the respondent.

The appellant appealed to this court.

The law regarding the jurisdiction of the High Court to issue an order of certiorari to quash an award of the Industrial Court is well settled in this country and need not be repeated. The learned judge in this case himself had referred to the judgment of my learned brother Gopal Sri Ram JCA, in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (CA). Another leading case in this country is of course the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC). In the latter case, the Federal Court followed the judgment of the House of Lords in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374 (HL) in particular, Lord Diplock's three grounds, ie: (i) illegality; (ii) irrationality; and (iii) procedural impropriety. As the judgment of the learned judge in this case is not challenged on the ground that he had misdirected himself on law, I do not think I need say more on it.

The challenge to the judgment of the learned judge is against his finding that the appellant had failed to comply with a valid order of the respondent to report for duty on 9 February 1999, that that was a fresh misconduct, that the respondent had the right to terminate her for that misconduct and had rightly terminated her the second time.

With respect to the learned judge, I am of the view that the issue is whether the respondent had complied with the terms of the first award.

That award says that the appellant was to be reinstated within one month of the date of the award, ie 22 November 1997. The appellant reported for duty on 22 December 1997 but she was given the letter dated 20 December 1997 saying that the respondent was not reinstating her as the respondent was 'appealing' (actually applying for an order of certiorari)

against the said award. It should be noted that even as on the day the respondent reported for duty (22 December 1997) the respondent had not even filed the application for certiorari in the High Court. The motion was only filed on 3 January 1998. Further, the fact that the said letter was dated 20 December 1997, ie one day prior to the expiry of the one month period, shows very clearly that the respondent did not intend to reinstate her during the said one-month period ordered by the Industrial Court.

It is also understandable why the appellant reported for duty on 22 December 1997 and not earlier. The first award ordered the respondent to reinstate her within one month, which period expired on 21 December 1997. The court did not order the appellant to go back to work within that period. It is reasonable to infer that during that period she was waiting for the respondent to call her back to work. The respondent did not do so. So, on the following day she went back to work but was given the letter dated 20 December 1997 saying that the respondent was not reinstating her. That is the clearest form of non-compliance by the respondent that can ever be.

Next, the first award also ordered that backwages be paid to her within one week after the appellant had reported for duty on 22 December 1997 (even though refused by the respondent). The backwages should have been paid by 29 December 1997. It was not paid. Here again there is a very clear non-compliance of the first award by the respondent.

In the circumstances, I am of the view that this is a clear case of non-compliance of the first award by the respondent. What had happened subsequently is of no consequence. It would have been different if the respondent had reinstated her during the period of one month and paid her backwages within the period of one week thereafter and subsequently she committed another misconduct and for that fresh misconduct her service was terminated. That could be a fresh case, under s 20 of the Act. Here, it is the respondent who had not complied with the first award by not calling her to go back to work within the one-month period and by not allowing her to resume her job when she reported for duty on 22 December 1997 and by not paying her the backwages as ordered by the Industrial Court. What happened subsequently is of no relevance. So, in my view, the argument that the second award had superceded the first award, that the first award had become academic, that the appellant had committed a fresh misconduct by not complying with the respondent's letter dated 5 February 1999 (more than one year after the expiry of the period by which time she should have been reinstated as ordered by the Industrial Court), that the respondent had a right to terminate her the second time and therefore her remedy lies under s 20(1) of the Act and not s 56(1) of the Act, that she had 'accepted' the second termination and had elected to seek her remedy under s 20(1) of the Act and is therefore estopped from seeking her remedy under s 56(1) of the Act, all fall to the ground.

The Industrial Court clearly has the jurisdiction to make the second award that it did under s 56(1) of the Act. That section provides:

> 56(1) Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not

been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement. A

(2) The Court may, upon receipt of the complaint —

(a) make an order directing any party

(i) to comply with any term of the award or collective agreement; or

(ii) to cease or desist from doing any act in contravention of any term of the award or collective agreement; B

(b) make such order as it deems fit to make proper rectification or restitution for any contravention of any term of such award or collective agreement; or

(c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement. C

The leading case on this section is *Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81 (SC).

The headnote of the report summarizes the facts and the judgment clearly and accurately and I quote: D

> In this case the respondent employers and the appellant trade union had entered into a collective agreement which provided, inter alia, that the respondent will give such advance notice as it is reasonably possible to the appellant in writing of any redundancy or retrenchment but such notice shall not be less than two months prior to retrenchment. The respondent informed the appellant of the need to retrench some of its employees and issued the E notices of retrenchment on the same day. The appellant protested and subsequently lodged a complaint with the Industrial Court of non-compliance of the collective agreement. The Industrial Court held that the appellant had made out its case and ordered the employees to be reinstated. The respondent then applied to the High Court for certiorari to quash the decision of the Industrial Court. The High Court holding that the Industrial Court had acted F in excess of jurisdiction in ordering reinstatement when dealing with a complaint of non-compliance, quashed the award of the Industrial Court. The appellants appealed.
>
> **Held**: It is abundantly clear that the Industrial Court could in the circumstances of the complaint of non-compliance in this case make the order that it did for the retrenched employees to be reinstated and this order was G properly made in accordance with the provisions of s 56(2)(b) of the Industrial Relations Act 1967, for the purpose of making proper rectification and restitution for a contravention of a term of the collective agreement. The order of the learned judge of the High Court in quashing the award of the Industrial Court must therefore be set aside.

Abdoolcader SCJ, delivering judgment of the court said at p 83: H

> The complaint of non-compliance with an award or collective agreement taken cognizance of is made under s 56(1) and the Industrial Court can then give the relief specified in sub-s (2) of that section …

It is true that in that case the complaint was for non-compliance of a collective agreement while in this case the complaint is for non-compliance I with an earlier award of the Industrial Court. But both such complaints are clearly provided for by s 56(1) of the Actas complaints that can be lodged

with the court and regarding which the court can make the orders provided for in that section.

The learned judge had also taken into consideration in arriving at his judgment that the appellant had not filed any affidavit in opposition to the substantive motion and said:

> In the absence of such an affidavit, the respondent (appellant in the appeal before this court — added) is deemed to admit the averments of the applicant' (respondent in this court).

He cited the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1955] 1 MLJ 281 (CA).

Again, in that case, it was my learned brother Gopal Sri Ram JCA, who delivered the judgment of this court. My learned brother said at p 286:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1998] 3 MLJ 332.

There is no doubt that that is the law. However, it should be noted that that appeal arose from an application for summary judgment by the respondent therein. The appellant therein opposed the summons by way of an affidavit, asserting that he had not received any demand from the respondent and that the respondent had not given him one month's notice of intention to proceed under O 3 r 6 of the RHC in view of the delay exceeding one year since the last proceeding. The respondent, however, did not file any affidavit in reply.

The allegations made by the appellant in that case in his affidavit, that were not replied to, were allegations of facts and in an application for summary judgment.

In *Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (SC), Lee Hun Hoe CJ (Borneo) delivering judgment of the court said at p 385:

> In his affidavit in reply dated 23 January 1984 and opposing the summary judgment, Liew Mook, the Managing Director of the appellant set out the facts relating to the variation of the agreement by the transfer of shares instead of transfer of land. Paragraph 14 of the affidavit which was set out earlier referred to the variation of the agreement and stated that the respondent was estopped from relying on the terms of the agreement.
>
> In his affidavit dated 30 April 1984 Choo Chok Low did not answer the matters raised in the above affidavit of Liew Mook. There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted.

As can be seen, it is also about an allegation of fact in a summary judgment proceeding.

In the present appeal, first, the proceeding before the learned judge was for an order of certiorari, arising from the second award made by the Industrial Court. The record of the proceeding before the Industrial Court was before the High Court. Both awards were there. The relevant letters were before the court, produced by the respondent in support of its application. What was in issue, really, was whether the respondent had complied with the first award. The relevant facts on that issue were not in dispute. Clearly, the appellant could rely on the same facts, letters and awards produced by the respondent at the proceeding before the learned judge. So, even if the appellant should not be allowed to refer to the affidavit she filed in support of her application to strike out the motion because she had not given notice of such intention (indeed I am of the view that it is a matter of discretion for the High Court whether to refer to it or not since the affidavit was filed in the same proceeding and in the same file), there was ample evidence for the learned judge to make his decision, whether in favour of the respondent or the appellant. In the circumstances of this case, the failure of the appellant to file an affidavit of opposition against the substantive motion is of no consequence.

In the circumstances, I am of the view that this is a clear case falling within the ambit of the provisions of s 56 of the Act and that it was within the jurisdiction and powers of the Industrial Court to make the second award that it did. The Industrial Court had not committed any error of law that warrants the High Court to review and quash the second award by an order of certiorari. We allowed the appeal with costs. The deposit lodged by way of security will be paid out to the appellant towards her taxed costs.

Appeal allowed with costs.

Reported by Moy Saw Han